UNITED NATIONS

General Assembly

FIFTIETH SESSION

Official Records

SIXTH COMMITTEE
30th meeting
held on
Friday, 3 November 1995
at 10 a.m.
New York

SUMMARY RECORD OF THE 30th MEETING

Chairman: Mr. LEHMANN (Denmark)

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Distr. GENERAL
A/C.6/50/SR.30
13 November 1995

ORIGINAL: ENGLISH

95-81999 (E)

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The meeting was called to order at 10.40 a.m.

AGENDA ITEM 142: ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (continued) (A/50/22)

1. Mr. HAMID (Pakistan) said that in order to deter the future occurrence of crimes such as those which had prompted the establishment of the ad hoc Tribunals for the former Yugoslavia and for Rwanda, Pakistan supported the establishment of a permanent international criminal court. His delegation considered the principle of complementarity important and favoured the primacy of national jurisdiction in order to preserve national sovereignty and to avoid conflicts between the jurisdiction of States and that of the proposed court. The court should complement national systems when they were found inadequate, in accordance with the principle that criminals should not go unpunished. Pakistan therefore supported limiting the jurisdiction of the court to the "core crimes", namely, genocide, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity. Pakistan objected to the inclusion of aggression among the crimes within the jurisdiction of the court, because it felt that the issue was a controversial one. The definition of that crime adopted by the General Assembly in 1974 was non-binding, and political rather than legal in character. For political reasons, the Security Council had rarely characterized a State as an aggressor. Moreover, aggression was generally considered a crime of States, and Pakistan felt that the court's jurisdiction should be limited to individuals. It was difficult to see how an individual could be prosecuted and punished for the crime of aggression unless the Security Council first determined the existence of aggression. The matter should be examined further to avoid future ambiguities if the crime were later brought within the jurisdiction of the court.

2. Pakistan favoured the principle of consensual, rather than inherent, jurisdiction since it felt that the latter was incompatible with the principle of State sovereignty.

3. Many developing countries might be unable, for financial reasons, to send their delegations to all the meetings of the proposed preparatory committee if three sessions were held in one year; moreover, it was difficult to predict the progress that could be achieved in a year. His delegation therefore supported the United States and other countries which had suggested that no definite date should be set for the conference of plenipotentiaries.

4. In formulating the draft statute, it was important to ensure that a compromise was reached on the representation of all the principal legal systems of the world, including that of Islam. The statute must not infringe on the sovereignty of States or overburden them financially since that would hinder the adoption of the statute and, even if it was adopted, might fail to generate universal acceptance through ratifications and accessions.

5. Mr. de SILVA (Sri Lanka) said that his delegation concurred with the ad hoc committee's conclusion that further consideration should be given to the draft statute and other proposals of Member States before the statute was brought before a conference of plenipotentiaries for adoption. It was important to

achieve in advance the widest possible degree of consensus among States; however, since the statute would, to some extent, involve a renunciation of sovereign rights, States must proceed with caution and scrutinize the statute intensely.

6. The court should be a permanent institution convenable as and when occasion warranted. It should be the outcome of a treaty to which the overwhelming majority of States were parties, yet it should work closely with the United Nations, whose support would enhance its credibility as a world body. The conceptual framework of the court ensured complementarity and did not derogate from current agreements on judicial cooperation and assistance consistent with the exercise of existing national jurisdiction in the field of criminal law. While an amendment to the Charter of the United Nations might seem logical for the establishment of an institution which sought to enhance the values of that Charter, the realities of international politics dictated the more practical course of a multilateral treaty.

7. While his delegation applauded the concept proposed by the International Law Commission in the draft statute and the clarificatory work of the Ad Hoc Committee, it seemed overly optimistic to expect ready acceptance of the statute by States and precipitous to place the statute in its existing form before a conference of plenipotentiaries. He hoped that adequate pre-conference preparations would increase the chances for acceptance of the draft statute, and favoured the establishment of a preparatory committee which would give particular attention to the principal questions and contentious issues and present alternative solutions.

8. The treaty to which the statute would eventually be appended must deal with the manner in which States parties would participate in the administration of the treaty and of the court; the question of meetings of States parties to the treaty and decision-making procedures; the manner in which the court was to be funded, including the question of cost-components; the other organizational or administrative provisions necessary for such a treaty; the question of the permissibility of reservations to the treaty and the ways in which the object of that treaty should be preserved; the settlement of disputes that might arise between States parties to the treaty; and provisions for entry-into-force requirements and amendment procedures. Governments would need to give consideration to those questions before committing themselves to the treaty.

9. Articles 20, 21, 23 and 25 of the draft statute, concerning the jurisdiction of the court, needed careful examination by concerned Governments. The Commission should specify the crimes to be referred to the court and establish the conditions to be satisfied before a particular case was receivable by the court. The definition of crimes must satisfy the standards of precision required under criminal law and those crimes must be of such a nature and such enormity that they merited trial before an international criminal court if national jurisdiction was inoperative.

10. Work on the statute should not be delayed until an international code of crimes could be finalized, but the two objectives could be pursued simultaneously. Moreover, the draft Code of Crimes against the Peace and Security of Mankind could be negotiated in stages and the draft statute for the

international criminal court could be periodically updated through additional protocols. The treaty for adoption of the draft statute might provide for its subsequent review and amendment in the light of later developments with regard to the Code. In any case, adequate provision must be made in both the Code and the statute for dealing with the crime of international terrorism.

11. With regard to article 23, which accorded the Security Council a role in referring matters to the court, the appropriateness of the relevant provisions in the context of a general international criminal court must be examined. The anomalies resulting from the distinction between permanent and non-permanent members, and between members and non-members, of the Council called in question the entire doctrine of equality before the law in a sphere which ought to be insulated from such extraneous influences. The provision was unlikely to encourage the widest possible adherence to the statute or to engender great confidence in the court. Moreover, Article 103 of the Charter of the United Nations established the primacy of the Charter over any other international agreement in the event of a conflict of obligations. Article 23 placed constraints on the exercise of national jurisdiction which was likely to inhibit the willingness of States to become parties to the statute, and the inclusion of that article should therefore be carefully considered.

12. Mr. GRAVA (Latvia) said that the international community was ready to provide moral and material support for a permanent court which would obviate the need for further ad hoc tribunals and be prepared to respond at the outset of future violations. Establishing the court by a multilateral treaty and requiring a high number of ratifications and accessions before that treaty could come into force would respect State sovereignty and endow the court with the necessary legal authority, and the establishment of links with the United Nations would provide it with moral authority. The conclusion of a special agreement between the court and the Organization would be the best way of defining the relationship between them.

13. The court should complement national criminal justice systems only where those systems were not available or were ineffective, and should have the authority to determine where that was the case. The statute should include a detailed definition of the principle of complementarity and of the procedures to be applied by States and by the court in determining jurisdiction. The court should not be merely a residual forum but should be vested with inherent jurisdiction over some of the crimes mentioned in article 20 of the draft statute. But, in order to attract the greatest possible number of signatory States, the "core crimes" should be limited to those universally acknowledged to be an affront to civilized nations and capable of precise definition, namely genocide, serious violations of the laws and customs applicable in armed conflict and crimes against humanity.

14. Respect for the principles of nullum crimen sine lege and nulla poena sine lege required that the statute should define clearly the crimes within the jurisdiction of the court either by reference to applicable conventions that were the subject of an international consensus or, preferably, by a precise definition within the statute. His delegation agreed that it was difficult to establish a satisfactory legal definition of aggression and to differentiate clearly between the acts of States and those of individuals. It did not support

giving the court jurisdiction over the crimes of apartheid, narcotics trafficking, terrorism, torture and crimes against internationally protected persons. While his delegation supported a narrow interpretation of the court's jurisdiction in order to gain the support of a maximum number of States as quickly as possible, it favoured the inclusion of a mechanism for periodic review in order to expand the court's jurisdiction or introduce functional improvements in its activity.

15. The role of the Security Council should be limited to referring generic matters to the court, which would preclude it from bringing cases against specific individuals. That would preserve the court's autonomy and keep political questions under the aegis of the Security Council. The statute should include, or be drafted simultaneously with, evidentiary, procedural and due process provisions and particular elements of substantive criminal law. Those provisions might include the court's ability to initiate an independent investigation and prosecution when it determined that a case fell within its jurisdiction.

16. The statute should address budgetary considerations to ensure that all States, as well as the court itself, could initiate proceedings without undue financial burdens. The United Nations might have a role to play in that regard.

17. His delegation felt that a preparatory committee should be formed at once in order to arrange a conference of plenipotentiaries in 1997.

18. Mr. KULYK (Ukraine) said that the tragedies of the former Yugoslavia and Rwanda had made it clear that an institution with permanent international criminal jurisdiction might contribute significantly to the deterrence of such crimes. The report of the Ad Hoc Committee for the Establishment of an International Criminal Court had clarified key issues such as complementarity, jurisdiction and judicial cooperation. Complementarity was an essential element in the establishment of an international criminal court; it created a strong presumption in favour of national jurisdiction and satisfied the desire of States to remain responsible and accountable for prosecuting violations of their laws while providing for recourse to the court where national legal procedures were unavailable or ineffective. The draft statute should strike a balance and clarify the relationship between international and national criminal jurisdictions.

19. The court's jurisdiction should be limited to "core crimes" under general international law, in particular those mentioned in article 20, subparagraphs (a) to (d) of the draft statute. A clear definition of those crimes, as opposed to a mere enumeration, would satisfy the principles of nullum crimen sine lege and nulla poena sine lege, ensure respect for the rights of the accused, enhance the credibility and moral authority of the court and thereby promote its broad acceptance by States. His delegation strongly supported the inclusion of the Convention on the Safety of United Nations and Associated Personnel in the list contained in the annex to the draft statute. The Convention dealt with serious offences and would tend to operate in situations where there were no adequate domestic procedures. Provision should also be made for periodic review of the list of crimes to be dealt with by the court.

20. His delegation supported the idea of establishing a preparatory committee to combine further discussion and drafting with a view to the preparation of a consolidated text of a convention. The preparatory committee should take into consideration both the draft statute and the written comments submitted to the Secretary-General; its work should be organized into several sessions, and there should be a clear indication in advance of the parts of the draft statute to be addressed at each session in order to allow the appropriate experts to attend the meetings. A specific date should be set for the conference of plenipotentiaries in order to avoid its indefinite postponement. His delegation hoped that the international community would demonstrate that it had the political will to take the necessary steps towards the establishment of a permanent international criminal jurisdiction.

21. Mr. MOLDE (Denmark) said that Denmark fully associated itself with the statement made by the representative of Spain on behalf of the European Union regarding the establishment of an international criminal court. There seemed to be general agreement that the crimes to be covered by the jurisdiction of the court should be limited to the "core crimes", namely genocide, serious violations of the laws and customs applicable in armed conflicts, and crimes against humanity.

22. Denmark was one of the countries which found it difficult to exclude aggression from the jurisdiction of the court, since, if the court was not mandated to deal with that crime, it would be deprived of much of the reason for its existence. Although aggression as such was a crime committed by a State and not an individual, it was not impossible to define a crime consisting of planning or ordering an act of aggression. In that connection, advantage should be taken of the work done by the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind.

23. However, initially limiting the court's jurisdiction to "core crimes" did not rule out the possibility of providing for a mechanism whereby the initial list of crimes could be reviewed periodically to permit the subsequent addition of other crimes. There again, the Commission's Code of crimes would prove valuable. Limiting the jurisdiction of the international criminal court to a few "core crimes" would likewise facilitate a solution whereby the court would have inherent jurisdiction with regard to all the crimes in question. That approach would also help to solve one of the questions relating to the principle of complementarity, since it would make it more acceptable to allow the court to decide when national jurisdiction was not available or not effective, in which case the court should have competence to exercise jurisdiction. The work of the Ad Hoc Committee had been very useful in identifying the problems and seeking solutions.

24. As suggested in the European Union's statement, the next step should be to establish a preparatory committee to formulate a consolidated draft convention for submission to the fifty-first session of the General Assembly and subsequent consideration and adoption by a diplomatic conference. His delegation agreed that, as recommended by the Ad Hoc Committee, further work should be based on the draft statute and take into account the reports of the Ad Hoc Committee and the comments of States and relevant organizations. Although it might be difficult for small countries, in particular, to allocate resources in order to

participate actively in the work of the preparatory committee throughout two sessions of three weeks, the total of six weeks was a realistic estimate of the time it would take to prepare a consolidated draft convention, provided a precise timetable was fixed.

25. Resolution of the many substantive legal issues still pending was not a necessary prerequisite for convening a diplomatic conference. The important point was to have identified the major outstanding issues and to have reached some understanding in principle on how to treat them. His delegation therefore welcomed the generous offer by the Italian Government to host the conference in 1997.

26. Mr. PRANDLER (Hungary) agreed that the establishment of an international criminal court was a vital component in maintaining peace and security throughout the world. Hungary, which neighboured on areas where grave crimes had been committed, had welcomed the decision of the Security Council to set up an ad hoc Tribunal for the prosecution of those crimes, and was ready to cooperate fully with the Tribunal.

27. The international criminal court should be established by a multilateral treaty, rather than by an amendment to the Charter of the United Nations. It was essential to ensure a very close relationship between the court and the United Nations, most probably by means of a special agreement. He preferred a flexible formulation regarding the appointment and qualifications of judges.

28. The court should be complementary to national criminal justice systems and its role should not be unrealistically ambitious since that would jeopardize the universal acceptance by States of the statute, on which the effective functioning of the court would be heavily dependent. He believed that a broad-based consensus existed for limiting the jurisdiction of the court to the most serious crimes, including genocide, serious violations of the laws and customs applicable in armed conflict and crimes against humanity.

29. Although there was considerable merit in the arguments for retaining aggression in the list of crimes, it would be extremely difficult to find a proper balance between the independence of the court in prosecuting or punishing aggression, and the primary responsibility for the maintenance of international peace and security attributed to the Security Council by the Charter. He therefore tended to agree with the political and legal arguments against including aggression within the jurisdiction of the court. However, provision for the possibility of review conferences would ensure that, in the next phase, the crime of aggression, and possibly other serious crimes, could be included.

30. His delegation wished to reiterate its position that in article 20, subparagraph (c), of the draft statute the words "serious violations of the law and customs applicable in armed conflict" should encompass not only violations under The Hague Conventions, but also grave breaches of the 1949 Geneva Conventions. The jurisdiction of the court should likewise include the most serious violations as defined in Additional Protocol II to the Geneva Conventions, relating to non-international armed conflicts.

31. Regarding procedure, provisions should be adopted which guaranteed a fair trial with full due process and ensured the rights of defence of suspects and accused persons.

32. The Ad Hoc Committee had fulfilled its mandate and thus a new phase was needed, necessitating establishment of a preparatory committee, which would ideally meet for two 3-week sessions in 1996. A decision on the precise date and venue for the conference of plenipotentiaries could be taken only be the General Assembly at its fifty-first session, in the light of the report of the preparatory committee.

33. Mrs. FLORES (Uruguay) said that exacerbated international tensions had increased public awareness and made the subject of an international criminal court more topical than ever.

34. The court should be efficient and permanent, with the necessary moral authority and independence to ensure universal support and participation. She agreed with the Ad Hoc Committee's proposal that the mandate for future work should be changed to include the preparation of a consolidated draft convention.

35. A restricted interpretation should be given to the principle of complementarity. No presumption should be created in favour of national courts, and the international court should on no account be given residual jurisdiction. The court should be given automatic jurisdiction ratione materiae in view of the trend towards restricting its jurisdiction to the most serious crimes of concern to the international community as a whole.

36. It was logical that article 21 of the draft should give the court inherent jurisdiction regarding genocide. With respect to the crimes listed in article 20, subparagraphs (a) to (d), the court should be able to exercise its jurisdiction without requiring the express acceptance of State parties provided for in article 22. In view of the gravity of the crimes in question, it should not be possible to accept the statute without accepting the court's jurisdiction. The international community's readiness to accept the court as a genuinely effective instrument would be demonstrated if a State's accession to the statute automatically implied acceptance of the court's jurisdiction over the crimes listed in article 20, with no additional acceptance requirement. The court's inherent jurisdiction must be broadened to prevent any possibility of the system of declarations depriving it of any practical function. Excessive restrictions on the court's jurisdiction, as proposed under article 22, could lead to a situation in which a State which became a party to the statute might, through its declaration of acceptance of the court's jurisdiction, exclude crimes which violated the peremptory norms of general international law.

37. She supported the inclusion of a review mechanism whereby the number of crimes within the court's jurisdiction could be extended in the future. She emphasized the importance of defining clearly those crimes to be included within the court's jurisdiction, and emphasized the close link between the statute and the draft Code of Crimes against the Peace and Security of Mankind. The role assigned to the Security Council under article 23 should be reviewed. Additional consideration should be given to the mechanism for triggering proceedings and to the possibility of, inter alia, extending the role of the

prosecutor to include authority to initiate pre-trial and trial proceedings. Maximum and minimum sentences should be specified, and consist solely of imprisonment. The rules of the court should be drawn up and adopted concomitantly with its statute.

38. Mr. BASNET (Nepal) commended the work of the Ad Hoc Committee, which had helped clarify a number of key issues. Other issues, however, required further consideration.

39. The need for an international criminal court had been widely recognized. Events in the former Yugoslavia and Rwanda and the absence of a statutory mechanism to prevent and punish serious violations of international humanitarian law had made that need even more pressing.

40. The basic principles on which the future of the international criminal court depended were complementarity, limited jurisdiction and State consent. A court established on the basis of those principles, and backed by a strong consensus, would find universal acceptance and have an important role to play.

41. To prevent it from being overburdened with work or obliged to rule on trivial matters, the court's jurisdiction should be limited to the "core crimes" of genocide, aggression, war crimes and crimes against humanity. The specifications and precise definitions of those crimes needed to be further elaborated and clarified.

42. The court should function as a complement to national criminal justice systems. It must not replace national courts or become an appellate court for them. It should respect the principle of complementarity, thereby ensuring the primacy of the jurisdiction of national courts, which had the resources and expertise needed to prosecute crimes and enforce penalties. The criteria for determining non bis in idem should be formulated in such a way as to ensure respect for the decisions of national courts. Care must be taken to prevent the international criminal court from assuming a supervisory role with regard to national jurisdictions. States Parties to the statute should be entitled to lodge a complaint with the court. The victims of the crimes and their families might also be considered as being entitled to seize the court.

43. There were still major differences among the parties concerned with regard to issues such as the role of the Security Council, the nature of the court, the application of the principle of complementarity, and precise definitions of the crimes under the jurisdiction of the court. It was important to arrive at a wider consensus and, accordingly, a step-by-step approach was the most appropriate for future work on the topic. Undue haste should be avoided.

44. His delegation did not see any immediate need to set the dates for convening a conference of plenipotentiaries. A great deal of preparatory work remained to be done. Moreover, it was not yet clear whether the two ad hoc Tribunals established by the Security Council were functioning effectively and whether they were hindered by any jurisdictional or financial difficulties. The draft statute should draw upon the experience of those tribunals. Financial implications for Member States arising out of the establishment of the court should also be studied and specified.

45. Mr. RATH (India) said that with the resurgence of genocide and crimes against humanity, the idea of establishing an international criminal court was once again gaining widespread support. His delegation had participated actively in the deliberations of the Ad Hoc Committee. Despite the latter's success in clarifying the issues involved, further discussion was needed in order to achieve consensus on a number of complicated substantive and procedural points, which had to take into account the law and practice of various legal systems, and that was best done in the context of the Ad Hoc Committee. It was not yet time to set deadlines.

46. With regard to substantive issues, if the proposed court was to be widely accepted, it had to be complementary and even supplementary to national jurisdictions and must not be viewed as a supranational authority supplanting them. National jurisdictions should continue to have primacy; the court should have jurisdiction only if a national jurisdiction was not available or not able to deal with specific, well-defined serious and exceptional crimes. Respect for the principle of complementarity would clearly exclude any hierarchical ranking of international and national courts; the international court would not be considered competent to entertain or judge in any manner questions concerning the quality, nature, legitimacy or effectiveness of national jurisdictions.

47. Exceptions granting the international court inherent jurisdiction did not correspond to the principle of complementarity and should be eliminated from the draft statute, which should incorporate such an understanding in its operative section. A provision of that nature would affirm beyond any doubt the legal significance of the court, leaving no room for any interpretation to the contrary, and would also establish the court's substantive and operative importance.

48. The list of applicable crimes could not be discussed without reference to the content of such crimes, the manner in which jurisdiction should be exercised over them, and trigger mechanisms. The definition of those crimes could not be viewed in isolation but must be understood in the context of the nature and exercise of jurisdiction, sanctions and applicable law. Thus, crimes listed under article 20 of the draft statute would have to be exceptionally serious and of concern to the international community as a whole. Emphasis should be placed only on crimes which were universally considered to be so by States and under international law.

49. The expression "serious violations of the laws and customs applicable in armed conflict", in article 20, subparagraph (c), was too vague. If it were interpreted to mean grave breaches of the 1949 Geneva Conventions, then such violations would fall into the category of treaty-based crimes, which did not, in principle, give rise to any difficulties. Anything beyond that interpretation would be controversial and impede consensus.

50. It was difficult on legal, political and practical grounds to accept any inclusion in the draft statute of references to common article 3 of the Geneva Conventions, Additional Protocol II or internal armed conflicts. In his country's view, common article 3 did not form part of the customary international law of war and Additional Protocol II was a treaty which applied only to the parties to it. The Geneva Conventions had been drawn up in the

context of a world war and had nothing to do with internal armed conflict. Common article 3 was too vague and general to be defined as having a normative character.

51. Aggression was a politically sensitive subject which had not yet been satisfactorily defined as a crime. To be included in the draft statute, the crime of aggression must first be precisely defined under the law.

52. The powers vested in the Security Council under Chapter VII of the Charter were not at issue in the draft statute. The real question was whether involvement by the Security Council in matters to be brought before the international criminal court would ensure the elements necessary for any international judicial institution: uniformity, the fair exercise of jurisdiction, equality for the accused, and impartiality and independence. The inherent jurisdiction envisaged for the court following referral to it of a matter by the Security Council could call in question the independence of the court and might cloud its objectivity, and should, accordingly, be eliminated from the draft statute. An international criminal court should not be empowered to hear any case already under consideration by the Security Council since that would be using the court as a means of bypassing the primary role of the Council in the maintenance of peace and security.

53. His delegation was not opposed to including genocide in the list of crimes under the court's jurisdiction. However, it did not endorse giving the court inherent jurisdiction over genocide, as currently provided under the draft statute. That was tantamount to amending the 1948 Genocide Convention and would set an undesirable precedent in treaty practice. The power granted under the draft statute to third States, which gave them the authority to initiate proceedings in respect of genocide without the consent of the territorial State, was also in violation of the Genocide Convention. Genocide, like the other crimes listed in the draft statute, should be a case in which optional jurisdiction was possible.

54. With regard to article 20, subparagraph (d), there was a need for more precise distinctions between war crimes, crimes against humanity and serious offences. With regard to the treaty-based crimes referred to in subparagraph (e) of that article, offences under international conventions which dealt with specific terrorist acts should be included as international crimes.

55. International criminal jurisdiction should be based on the prior consent of States and article 22 of the draft statute rightly required that States parties give their express consent to be bound by the court's jurisdiction. That system of optional jurisdiction should apply to all of the crimes under the statute. There could be no exceptions for the crimes of genocide and aggression, as was currently the case.

56. In terms of trigger mechanisms for invoking the jurisdiction of the court, his delegation was not opposed to broadening the requirements for consent to include the State of which the accused was a national and the State most affected by the crime.

57. The draft statute ought to make specific reference to the draft Code of Crimes against the Peace and Security of Mankind. The two texts should be mutually compatible.

58. In terms of its proceedings, the court should respect well-known principles of criminal justice generally recognized by national systems. The statute should include safeguards for the procedural rights of the accused including notification of indictment; establishment of the case prima facie, right to legal assistance, scope for objections, fair and expeditious trials open to the public, respect for the principle nullum crimen sine lege, equality before the law, presumption of innocence, appeal and review processes, and the possibility of pardon, parole or commuted sentences.

59. More work needed to be done in the sensitive area of judicial cooperation and mutual assistance. Extradition was the most common legal form of transferring a suspect from one State to another and was generally regulated by national legislation through bilateral agreements. An element of reciprocity was usually present in terms of the offences for which suspects could be extradited. That could not be applied in the context of surrender to an international criminal court.

60. The rules of evidence and procedure of the international criminal court should be formulated and adopted as part of the draft statute.

61. Mrs. SEMAMBO KALEMA (Uganda) said that recent world events, in particular the atrocities committed in the former Yugoslavia and Rwanda, demonstrated clearly that there could no longer be any doubt of the need for an international criminal court. Her delegation was strongly in favour of establishing a permanent and independent international court, which would obviate the need for ad hoc tribunals in the future.

62. Her delegation shared the view that the court should be established by means of a multilateral treaty. While the draft statute provided an excellent basis for establishing the court, discussion was still needed to resolve some complex issues.

63. An international criminal court must operate on the basis of the principle of complementarity: the court would exercise its jurisdiction where national legal systems were unavailable or ineffective. That principle should, moreover, be reflected in the operative section of the statute in order to avoid ambiguity and ensure that the court could function effectively. The inherent jurisdiction to which the statute made reference must be compatible with the principle of complementarity.

64. The court's jurisdiction should be limited to the most serious crimes, as set forth in article 20 of the draft statute, with the exception of offences established in treaties dealing with terrorism and drug trafficking, which could be handled by national courts, and the crime of aggression. In that connection, her delegation had reservations with regard to including aggression in the list of "core crimes". Aggression was generally attributable to States rather than to individuals and the court would be dealing exclusively with the latter.

Limiting the court's jurisdiction would also serve to promote universal acceptance of its statute and enhance its effectiveness.

65. It would be appropriate to include in the statute a review mechanism to allow for the addition of other crimes in the future. In that connection, her delegation supported the proposal by the Russian Federation that the draft Code of Crimes against the Peace and Security of Mankind might be used as source in the event that new crimes were to be added to the statute.

66. The rules governing court proceedings should form an integral part of the draft statute. The rights of the accused should be guaranteed by the court. Careful consideration should be given to the question, still greatly in need of clarification, of the degree or extent of compliance of States parties with their obligation to cooperate with the court.

67. With regard to the question of triggering mechanisms, the Security Council might be entitled to refer cases to the court. However, the relationship between the court and the Security Council must not be influenced by political considerations.

68. Setting up an international criminal court would require considerable financial resources. Financing should be provided from the United Nations budget, which would distribute the burden among States and prevent it from falling exclusively on the shoulders of those which had agreed to be bound by the court's jurisdiction. It would also avoid repetition of the problems currently challenging the ad hoc Tribunal for Rwanda and ensure that the international court became a reality.

69. Her delegation was in favour of setting up a preparatory committee to hold further discussions and draft a consolidated text for submission to a conference of plenipotentiaries. In that regard, it was important to set realistic dates for those efforts.

70. Mr. DANESH-YAZDI (Islamic Republic of Iran) said that recent events in the former Yugoslavia and Rwanda, and the establishment of ad hoc tribunals by the Security Council, demonstrated the need to establish a permanent mechanism to prosecute and suppress international crimes. Contemporary international law was based primarily on the will of sovereign States to create certain legal rules which would govern inter-State relations; such rules were binding and had legal validity only when sovereign States had consented to their effect.

71. It was evident that only an effective criminal court would meet the expectations of the world community. The universality of the court must be ensured; every effort should be made to facilitate the broadest possible participation of States. The court should function as an independent judicial forum, free from political pressures and tendencies. Although the Charter entrusted the Security Council with primary responsibility for the maintenance of international peace and security, that responsibility should not be construed in a way that hindered the court's functions, especially in the case of determination of the existence of an act of aggression. The logic behind the principle of separation of powers between judicial and executive branches should be applied in the context of relations between the Security Council and the

court. The court, as a judicial forum, must act independently from other international bodies within and outside the United Nations system.

72. His delegation's views on the list of crimes to be included in the draft Code of Crimes against the Peace and Security of Mankind applied to the item under consideration. It believed that the crime of aggression, which was of the utmost importance to the international community, must remain in the draft statute.

73. On the principle of complementarity, his delegation believed that the concepts of availability and effectiveness of national criminal justice systems set forth in the preamble lacked the precision needed for the statute, as a legal instrument, and should be defined clearly. In addition, the establishment of the court and the jurisdiction accorded to it should not prevent national courts from performing their functions and exercising their jurisdiction. Unless otherwise explicitly agreed by the parties to the Statute, the court should not act as a supranational body.

74. On the requirements for the applicability of the court's jurisdiction in each specific case, the consent of the States most directly concerned, such as the State in whose territory the crime had been committed or the State of nationality of the accused, was a significant factor.

75. His delegation was satisfied with the preparatory arrangements to be made in 1996 in order to facilitate the convening of the conference of plenipotentiaries.

76. Mr. AL-ANAZEE (Kuwait) said that the establishment of an international criminal court had been an aspiration of the international community since the founding of the United Nations, in order to put an end to the serious crimes perpetrated against humanity. Kuwait, which was bound by the principles of international law and effectively contributed to efforts to develop international law, strongly supported the establishment of the court. The codification of law and determination of penalties was the only means of deterrence for those contemplating crimes against humanity. However, while his delegation supported the speedy establishment of the court, that should not be done at the expense of the solidity of its statute and judicial procedures.

77. Kuwait's desire for an international criminal court resulted from its experience of the Iraqi invasion and occupation, and the war crimes and serious violations of international humanitarian law perpetrated by the leaders of the Iraqi regime. The Iraqi people themselves had been victims of those criminal practices and policies. Kuwait therefore wanted the perpetrators of those crimes to be punished and was ready to provide all necessary information and documents to prove that the leaders of the Iraqi regime had perpetrated crimes against the Kuwaiti people.

78. His delegation believed that the statute of the court should be mandatory for all States so that the court could effectively protect humanity against crimes threatening peace and security. It was in favour of convening a diplomatic conference to adopt the statute at an appropriate time and believed

that it was important to restrict the court's jurisdiction to serious crimes including aggression, genocide, crimes against humanity and war crimes.

79. Mrs. FERNÁNDEZ de GURMENDI (Argentina) said that her delegation supported the Ad Hoc Committee's conclusion that the time had come to undertake negotiations on a consolidated text of a convention to be adopted by a conference of plenipotentiaries, but was concerned that the negotiating stage might be indefinitely prolonged in successive working groups. The momentum created by the International Law Commission and the Ad Hoc Committee must be maintained with a view to the convening of a conference of plenipotentiaries, if possible in 1997, with the participation of all States and relevant organizations.

80. The success of the court would depend on the extent to which idealism was combined with political realism so that the court would attract universal support without losing its ability to prevent and punish the most serious international crimes. The court should have very limited jurisdiction, covering only the small number of serious crimes which offended the universal conscience as a whole, such as genocide, war crimes (including crimes committed in non-international armed conflicts), and crimes against humanity (including those committed in times of peace). The court should have inherent jurisdiction over those crimes. The Security Council should be able to refer situations, although not necessarily specific cases, to the court; and the court should be complementary to national courts, but not subject to them.

81. Mr. GOGOBERIDZE (Georgia) said that his Government attached great importance to the early establishment of an international criminal court. War crimes had become more frequent and more flagrant, especially in non-international armed conflicts, as in the case of the former Yugoslavia, Rwanda and Georgia. His delegation welcomed the establishment of the ad hoc Tribunals for the former Yugoslavia and for Rwanda and looked forward to the establishment of a permanent jurisdictional body capable of ensuring that violations of international law did not go unpunished. The court should embody the fundamental principles of international criminal law and should be able to hold individuals personally responsible if they had planned, ordered or committed gross crimes under international law. It should be able to bring to justice those accused of the most heinous crimes in proceedings which guaranteed all the internationally recognized safeguards for fair trials adopted by the international community over the past half century.

82. His delegation supported the proposal that the court should be established under a multilateral treaty. Its relationship with the United Nations could be based on an agreement between the United Nations and the court. The principle of complementarity was extremely important; the court would fill the gaps left by domestic law enforcement which prevented the prosecution of some of the most serious crimes. It should primarily be an international legal institution complementing national criminal jurisdiction and enforcement. The court's jurisdiction should be limited to extremely serious crimes, namely genocide, crimes against humanity and serious violations of the laws and customs applicable in armed conflict, including breaches of the 1949 Geneva Conventions. Georgia was not opposed to the inclusion of aggression, but felt that it was necessary to define the crime of aggression and draw a clear line between the

acts of States and those of individuals. The court would be a strong deterrent for the most serious crimes. His delegation looked forward to the convening of a diplomatic conference in 1997 for the final adoption of the statute.

83. Mr. TUN (Myanmar) said that his delegation welcomed the progress made by the Ad Hoc Committee, which augured well for the establishment of a permanent international court to ensure that perpetrators of serious international crimes were brought to justice. At the same time it was clear that further work needed to be done to address outstanding issues in order to develop a judicial organ that would be acceptable to the international community. His delegation favoured a step-by-step approach that would lay down firm foundations for an independent court that was free from political pressures and had well-defined jurisdiction.

84. His delegation shared the view that the principle of complementarity was an essential element of the court. The court must be complementary to national criminal justice systems and be resorted to only when trial procedures by national courts proved to be impossible. Sovereign States had a vital interest in assuming responsibility for prosecuting violations of their national laws and that in turn served the interests of the international community. His delegation felt that the principle of complementarity laid down in the preamble of the draft statute should be elaborated in the operative part.

85. His delegation concurred with the idea that the court's jurisdiction should be limited to a few of the most serious crimes under general international law, and felt that the crime of aggression should be excluded in view of the lack of consensus on a legal definition of aggression and because of the political character of the issue. The establishment of an effective international criminal court could become a reality only with the express consent of States. The concept of inherent jurisdiction was incompatible with the principle of State sovereignty as embodied in the Charter. The court should therefore be established as an independent judicial organ by means of a multilateral treaty.

The meeting rose at 1.05 p.m.

UNITED NATIONS

General Assembly

FIFTIETH SESSION

Official Records

SIXTH COMMITTEE
31st meeting
held on
Monday, 6 November 1995
at 10 a.m.
New York

SUMMARY RECORD OF THE 31st MEETING

Chairman: Mr. LEHMANN (Denmark)

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Distr. GENERAL
A/C.6/50/SR.31
15 November 1995

ORIGINAL: ENGLISH

95-82029 (E)

The meeting was called to order at 10.30 a.m.

TRIBUTE TO THE MEMORY OF YITZHAK RABIN, PRIME MINISTER OF ISRAEL

1. The CHAIRMAN paid tribute to the memory of Yitzhak Rabin, Prime Minister of Israel, and requested the representative of Israel to convey the Committee's condolences to the Government and people of Israel.

2. At the invitation of the Chairman, the members of the Committee observed a minute of silence.

AGENDA ITEM 142: ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (continued) (A/50/22)

3. Mr. AMIRBEKOV (Azerbaijan) reiterated his delegation's strong commitment to the establishment of a permanent international criminal court, which would strengthen international cooperation in the prosecution and suppression of the most serious crimes that threatened international peace and security. The early establishment of the court would obviate the need to set up ad hoc tribunals for particular crimes and would ensure consistency in international criminal jurisdiction. The need to expedite the establishment of the court was even more evident at a time when the security and stability of the world community were being jeopardized by such phenomena as genocide, separatism, ethnic cleansing and xenophobia.

4. His delegation supported the idea of establishing the court by means of a multilateral treaty, as recommended by the International Law Commission; that would be consistent with the principle of State sovereignty while ensuring the legal authority of the court. The principle of complementarity was of paramount importance because it recognized the primacy of national criminal jurisdiction; however, that principle needed to be defined more clearly. His delegation agreed that only core crimes should be included in the court's jurisdiction and felt that the crime of aggression must be included, since the principle of the non-use of force by Member States against the territorial integrity or political independence of other States was enshrined in the Charter.

5. It was possible to strike a balance between the requirements of the independence of the court and the need to respect the primary role of the Security Council in the maintenance of international peace and security. The recent crisis in the Balkans and the aggression perpetrated by a neighbouring State against Azerbaijan had shown that acts or wars of aggression should be nipped in the bud and that their perpetrators must not go unpunished.

6. His delegation welcomed the idea of establishing a preparatory committee to prepare a consolidated text of a convention for an international criminal court and to set a date for the holding of a conference of plenipotentiaries.

7. Mr. VILCHEZ ASHER (Nicaragua) said that a permanent international criminal court would fill a gap in international law. The ad hoc tribunals established for the former Yugoslavia and Rwanda confirmed the need for a permanent court, based on a multilateral treaty, to which States could submit cases of

atrocities. Since primary responsibility for the protection of persons fell to States, the court should complement national courts and international judicial cooperation procedures. A balance should be sought when formulating that principle, however, so that the court's jurisdiction would not simply be residual to national jurisdictions. Nor should the court become an appeals court for the review of national verdicts.

8. The crimes to be taken up by the court should be limited to those of greatest concern to the international community as a whole, such as the crimes listed in article 20 of the draft statute. However, the draft statute should not contain definitions of those crimes, which were defined in other international treaties. The crime of aggression should not be excluded, in view of the precedent of the Nürnberg trial; the definition in General Assembly resolution 3314 (XXIX) could be used as a basis. Moreover, a link should be established between the future Code of Crimes against the Peace and Security of Mankind and the draft statute.

9. The draft statute should include a mechanism that would make it possible to take into account the development of international criminal law and increase the number of crimes over which the court would have jurisdiction. The principles of legality, nullum crimen sine lege and nulla poena sine lege, must be respected by the court.

10. His delegation felt that it would be contradictory to the principle of complementarity to give the court inherent jurisdiction over the crime of genocide. The court should have jurisdiction only when a case had been submitted to it by States parties to the statute, or by the Security Council under Chapter VII of the Charter. That would avoid the establishment of new ad hoc tribunals such as those for Rwanda and the former Yugoslavia.

11. His delegation agreed that a preparatory committee should be established with a broader mandate than that of the Ad Hoc Committee with a view to the convening of a conference of plenipotentiaries in 1997.

12. Mrs. ONANGA (Gabon) said that the establishment of an international criminal court would fill the gaps in the international criminal system and make it possible to prosecute the perpetrators of crimes and secure reparation for the victims.

13. Her delegation was not satisfied with the approach of transposing domestic legal systems to the international level. It was also concerned about the competence of the Security Council to refer matters to the court under article 23, paragraph 2, of the draft statute, for the reasons for set out in paragraph 123 of the Ad Hoc Committee's report.

14. The competence ratione materiae of the court should be limited to the most serious, or core, crimes. Her delegation welcomed the proposal to hold an international conference of plenipotentiaries in 1997 to sign a convention establishing the international criminal court.

15. Mr. HABIYAREMYE (Rwanda) said that an international criminal tribunal had been established for Rwanda because it had been the scene of genocide and crimes

against humanity so shocking as to convince even the most cynical that the international community could not remain indifferent. In the face of the inability of the United Nations to deal with the situation, and the withdrawal of the Blue Helmets, a tribunal had, after many delays, been established under Security Council resolution 955 (1994), although it had yet to begin its work.

16. The purpose of an international criminal court would be to prevent and deter international crimes, in accordance with the principle that criminal law should be in existence before the situations it was called upon to regulate occurred so as to avoid trials intuitu personae.

17. At the current stage the General Assembly should review the few questions which remained regarding the draft statute in order to define precisely the mandate for the preparatory committee, including the convening of a conference of plenipotentiaries by 1997 at the latest. If atrocities such as those which had been committed in Rwanda and were still unpunished were to be avoided, the international community must not waste time in interminable academic discussions. The limitation of the court's jurisdiction ratione materiae would make the court more effective and avoid possible conflicts of jurisdiction. His delegation agreed that genocide, war crimes and crimes against humanity as defined in the relevant international conventions should be included in the draft statute and that other crimes, including aggression and terrorism, could be added in the future, after they had been precisely defined. The court could draw on the draft Code of Crimes against the Peace and Security of Mankind, in that respect.

18. The court's effectiveness would depend on its independence from States; the concept of complementarity should not create a presumption in favour of national jurisdiction. The primacy of the international court should be preserved without preventing national courts from exercising concurrent jurisdiction. In the event of disputes as to jurisdiction, the court would relinquish jurisdiction to national courts but would be competent to retry cases where national trial procedures were unavailable or ineffective, without the possibility of invoking the principle of non bis in idem. The principle of complementarity should be defined in the preamble in order to indicate precisely the overall context in which the statute was to be interpreted.

19. The court should be linked by a convention to the United Nations system but must be independent from the political interests of Member States. The preparatory committee for the conference of plenipotentiaries should begin its work as soon as possible and should involve as many countries as possible to ensure the universality of the court.

AGENDA ITEM 145: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (A/50/33, A/50/361 and A/50/403)

20. Mr. SURIE (India), Chairman of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, introducing the report of the Special Committee (A/50/33), said that at its 1995 session, the Special Committee had had on its agenda a number of proposals relating to the maintenance of international peace and security and the peaceful

settlement of disputes between States. Those items had been on its agenda from its inception. In addition, the Special Committee had considered two other issues: the question of the deletion of the "enemy State" clauses from the Charter of the United Nations and the question of the review of the membership of the Committee.

21. In the framework of its Working Group, the Special Committee had first considered the question of the implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions under Chapter VII of the Charter. While the need to assist third States thus affected had been recognized by all members, there had been no general agreement on possible remedial measures. The measures which had been suggested included resorting to international financial institutions, the establishment of a trust fund and full transparency in the proceedings of the Security Council and its sanctions committees. Since the Special Committee had not received the report of the Secretary-General requested in General Assembly resolution 49/58 in time for its session, it had deferred further consideration of the matter and invited the General Assembly to consider the establishment of an open-ended working group within the framework of the Sixth Committee to give further consideration to the matter. That working group had been established and was currently considering the report of the Secretary-General (A/50/361).

22. The Special Committee had considered two other proposals under the general topic of the maintenance of international peace and security. The first was a revised proposal by the Libyan Arab Jamahiriya aimed at enhancing the effectiveness of the Security Council in maintaining international peace and security. Some delegations had felt that the proposal deserved serious study, even if certain aspects of it were under consideration in other United Nations forums, while others felt that it could not serve as a basis for a meaningful discussion, that its provisions were controversial and unbalanced, and that the consideration of such issues in the Special Committee was inappropriate and redundant. The second proposal, a working paper submitted by Cuba under the title "Strengthening of the role of the United Nations in the maintenance of international peace and security: strengthening of the role of the Organization and enhancing its effectiveness" had been introduced by the sponsor but not discussed in the Working Group.

23. The Special Committee had successfully concluded its work on the draft United Nations Model Rules for the Conciliation of Disputes between States, which were reproduced in paragraph 55 of the report. The Model Rules constituted a flexible instrument at the disposal of States for the peaceful settlement of disputes. They consisted of 29 articles which, in accordance with article 1, States were free to apply in their entirety or in an amended form. The Model Rules, which covered each stage of the conciliation proceedings, provided for the obligation of the parties not to act in a manner which might have an adverse effect on the conciliation and for preservation of the legal position of the parties. They also dealt with the apportionment of costs. The Special Committee recommended that the General Assembly should bring the text of the Model Rules to the attention of States by annexing it to a decision or resolution to be adopted at the current session.

24. Under the same topic, the Working Group had considered the proposal submitted by Sierra Leone under the title "Establishment of a Dispute Settlement Service offering or responding with its services early in disputes". Delegations had generally welcomed the intention underlying the initiative but considered that a number of aspects required further clarification. The sponsoring delegation had therefore been requested to prepare a detailed commentary on the proposal, which had been circulated as document A/50/403.

25. On the question of the deletion of the "enemy State" clauses from the Charter of the United Nations the Special Committee, as indicated in paragraph 65 of its report, had recommended a draft resolution for adoption by the General Assembly whereby the Assembly would express its intention to initiate the procedure to amend the Charter, with prospective effect, through the deletion of the "enemy State" clauses from Articles 53, 77 and 107 at its earliest appropriate future session.

26. While the issue of review of the membership of the Special Committee had been on the agenda for some time, it had been brought to the forefront by the increasing interest shown in the Committee's work by delegations attending the sessions as observers. That situation had led the Special Committee to recommend, in paragraph 67 of its report, that it should henceforth be open to all States Members of the United Nations and would continue to operate on the basis of consensus.

The meeting rose at 11.10 a.m.